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SUBJECT: Convention on Certain Conventional Weapons (CCW) Meetings and Cluster Munitions Negotiations, November 3-14, 2008

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CLASSIFIED BY: LEGAL AFFAIRS MKHANNA FOR REASONS 1.4 (B) AND (D)

**¶1.** (U) Summary. A U.S. delegation participated in the fifth round of negotiations on the issue of cluster munitions within the framework of the Convention on Certain Conventional Weapons ("CCW"), held November 3-7 in Geneva. The delegation also participated in the meetings of States Parties to Amended Protocol II (November 12), Protocol V (November 10-11), and the entire Convention (November 13-14). This round of negotiations on the issue of cluster munitions was the final round of negotiations provided for in the Group of Governmental Experts ("GGE")'s mandate. A number of countries that participated in the Oslo Process blocked progress on the negotiations and succeeded in ensuring that no Protocol will be completed this year. The U.S. delegation expressed its disappointment at this result, particularly in light of the fact that a number of major producers and users of cluster munitions (such as China and Russia) may have been willing to accept a Protocol text that would have had substantial humanitarian benefits. It should be noted, however, that these major producers and users also raised some issues with the text under discussion here.

**¶2.** (U) The negotiations began on the basis of a new Chairman's draft put out at the end of the week before the negotiations by Danish Ambassador Wigotski. This draft, in turn, was based on P-5 and P-3 negotiations in advance of the final round of negotiations. On the critical issue of Article 4 which sets forth requirements for technical improvements to cluster munitions, the P-5 had agreed in the September round of negotiations on a common text. However, in consultations in New York just before the November session, both the UK and France said that there was strong opposition on the part of some Oslo Process states to this text, and suggested additional changes. The U.S. delegation prepared a new text to address these additional demands, and met again informally in both P-5 and P-3 formats to discuss. The result was a P-3 agreement in the days before the start of the negotiations on a new text of the Protocol that could form the basis for work during the negotiations. The UK, and to a lesser extent France, made clear, however, that they still had some concerns about this revised text.

**¶3.** (U) After a few plenary sessions in which little progress was made and after a number of more productive small group and bilateral meetings, the negotiations were in effect killed by a statement read by Costa Rica on behalf of a group of 25 countries, including Austria, Belgium, Bosnia and Herzegovina, Chile, Guatemala, the Holy See, Honduras, Indonesia, Ireland, Mexico, New Zealand, Norway, Peru, Venezuela, and South Africa that indicated that they found the Chairman's draft text unacceptable since it did not go far enough toward banning cluster munitions. Subsequent proposed amendments by some of these countries highlighted that they were not constructively

engaging in the process but simply trying to derail the negotiations. Unspoken publicly but admitted privately was the fact that some of these countries would have been unwilling to accept any agreement on a Protocol in the CCW at this time, given that the effect of an agreement here would have been to diminish the December 3rd signing ceremony in Oslo for the Convention on Cluster Munitions.

**¶14.** (U) The Meeting of High Contracting Parties adopted a mandate to continue the negotiations next year and scheduled negotiations for February 16-20 and April 14-17. It was decided that Mr. Gustavo Ainchil of the Disarmament Directory of the Ministry of Foreign Affairs from Argentina will be the Chairman of the negotiations next year. End summary.

#### Technical Improvements

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**¶15.** (U) Much of the focus of the cluster munitions negotiations was on Article 4 in the Chairman's draft text, which addresses the issue of technical improvements. After the July round of negotiations, it had become clear that it was essential to make progress on this article in order to resolve impasses in a number of other areas in the draft text.

In September, the P-5 agreed on a prohibition on the use, development, production or acquisition of cluster munitions that do not meet one of three sets of criteria. The first set of criteria required that each submunition incorporate at least one of five listed safeguards to effectively ensure that unexploded submunitions no longer function as explosive submunitions. A second set of criteria required States to ensure that, after dispersal, cluster munitions result in no more than 1% unexploded ordnance across the range of intended operational environments. (This second set of criteria essentially duplicates the DoD cluster munitions policy adopted in June.) Finally, a third available option required cluster munitions to incorporate the various characteristics contained in the Oslo Process convention text. The draft also incorporated a provision providing for a transition period during which States may defer compliance with the prohibition provisions.

**¶16.** (U) During the P-5 and P-3 consultations in New York, a number of changes were made to this draft in order to satisfy additional UK and French concerns, presumably echoing concerns that they were hearing from other Oslo states. Most significantly, the French indicated that they would not be able to agree to a text that did not replicate the exception in the Oslo Convention's definition of "cluster munition" for certain technically advanced cluster munitions produced by the French and the Germans. The U.S. delegation indicated that we could accept moving this exception from the text of Article 4 to the definition of "cluster munition" so long as the Protocol text was clear that the same rules apply to both the cluster munitions permitted by Oslo, and to the cluster munitions permitted by the new CCW Protocol. The French delegation indicated that this might be difficult for them to accept, but that they understood our perspective and accepted the language required to accomplish this result in the draft provided to the Chairman. Several other changes to Article 4 were also agreed, including adding a prohibition on transfers within Article 4.

**¶17.** (U) During the course of the negotiations, two problems in particular emerged with respect to Article 4. First, the French and UK delegations began to oppose the idea that the cluster munitions excepted from the Oslo Convention should be subject to the same rules as the other categories of cluster munitions that would be permitted by a new Protocol. They were joined in this by a number of other delegations, most vocally Germany. At no time were they able to articulate a credible substantive objection to a single one of the obligations that this would impose (application of international humanitarian law, victims assistance, transfer restrictions, etc.). Instead, their goal appeared to be solely to maintain the special status that their exempted cluster munitions have under the Oslo Convention. The U.S. delegation made clear that the United States would not accept this approach. Second, the standard described in paragraph 4 above that requires one of four safeguards that "effectively ensure" that unexploded submunitions will not function as explosive submunitions also attracted considerable attention. A number of delegations and NGOs objected to the phrase "effectively ensures" on the grounds that it was too vague. On the other side, the Indian delegation expressed serious reservations about the same phrase on the grounds that it could be interpreted by some to require a 0% UXO rate. A number of alternative formulations were discussed, but none attracted

consensus.

¶18. (U) Another problematic issue in Article 4 concerns the transition period. Many states that intend to sign the Oslo Convention indicated their opposition to transition periods, and urged as short a transition period as possible if the text needs to include one at all. In consultations with Israel, Korea, India, and others, the U.S. delegation learned that a number of countries will require a total transition period of 20 years (though this could be packaged as a series of shorter transition periods if helpful). The U.S. delegation informed these delegations that it would support them in seeking a transition period this long, even though from a U.S. national perspective, a ten year transition period would suffice.

#### Storage and destruction

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¶19. (U) A second article that attracted considerable attention was Article 5 on storage and destruction. The U.S. delegation had indicated repeatedly that we could not agree to an obligation to destroy cluster munitions by any particular date, because of the size of our stockpiles and resource and capacity limitations. Other delegations, in particular the French delegation, stated that they believe that the concept of destruction has to be included in the protocol in some manner, even if there is no deadline for destruction. While no final agreement was reached on Article 5, it appeared that a compromise approach would be possible that would add "destruction" into the title of the article and identify destruction as an objective, but place no time limits on its accomplishment. In addition, the Korean delegation correctly pointed out that it should be clear that the obligations in this article do not apply to prohibited cluster munitions during the transition period that will be found in Article 4. There did not appear to be opposition to incorporating this point.

#### Transfers

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¶10. (U) During the September session, the British and French delegations had argued that an immediate ban on transfers of all cluster munitions that do not meet the requirements in Article 4 is critical because of the potential problem of countries "dumping" their old stocks of cluster munitions onto the world market before coming into compliance with the Protocol. The U.S. delegation noted that it has defense cooperation relationships with other countries that would make it impossible for the United States to agree to a complete ban on such transfers prior to the end of the transition period. As a way to bridge this gap, the U.S. delegation prepared a revised proposal on transfers for discussion by the P-5 group which included several provisions intended to address the concern identified by the UK and France. The U.S. revised text included the proposal Israel had initially made to ban transfers to non-state actors, a prohibition on transfers of cluster munitions that have been significantly degraded from their original specifications, and a prohibition on transferring cluster munitions manufactured before a certain date (with the date left unspecified at that stage) except pursuant to existing patterns of cooperation. The use of the term "existing patterns of cooperation" has a precedent in the Strategic Arms Reduction (START) Treaty and would refer to defense agreements as well as other security cooperation.

¶11. (U) During the informal consultations in New York, the U.S. delegation was able to offer 1990 as the date prior to which cluster munitions that do not meet the criteria in Article 4(2) would not be permitted, absent an existing pattern of cooperation. Neither the P-5 nor the P-3 had extensive changes to the draft transfer provision during these consultations. However, in discussions once the negotiations started in Geneva, the UK delegation in particular focused extensively on Article 6 on transfers. While they generally expressed a view that its prohibitions should be more broadly defined, and argued that the article should be much simpler, they did not articulate clearly exactly what content they believed the article should have.

#### Victims' Assistance

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¶12. (U) At the September round of negotiations, the Friend of the Chair for victim's assistance convened several informal meetings and made good progress on Article 10 during the course of the week. The U.S. delegation sought and obtained a number of changes to the draft

text in order to clarify its meaning and make it more consistent with the way that assistance is provided to victims in the U.S. system. The remaining issue on Article 10 that was not resolved in September was whether to include a reference to "in accordance with applicable international humanitarian and human rights law." The U.S. delegation, along with the Israeli delegation, opposed including this phrase on the grounds that it is unnecessary, does not add any clarity to the obligations in the article, and risks opening debate over the applicability of human rights law during periods of armed conflict. During the discussions on Article 10 in November, the U.S. delegation proposed as a compromise that a more general reference to "applicable international law" be used instead. While this initially appeared to attract support, after it became clear that agreement would not be reached on the core issues in the draft text, a number of delegations began reopening issues that had been previously agreed and seeking to reintroduce language that the U.S. delegation could not accept. Therefore, there was no final resolution to the "applicable international law" language.

#### Definitions

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**¶13.** (U) The Friend of the Chair for Article 2 on definitions convened an open-ended informal session on the issue of definitions. Most of the discussion focused on the issue of the exclusion from the definition of "cluster munitions" for the types of cluster munitions excluded from the Oslo Convention. The Russian delegation in particular voiced conceptual objections to this approach, noting that these weapons are in fact cluster munitions. The U.S. delegation noted that, while we agree that these are in fact cluster munitions, we could reluctantly accept this approach, but only if all of the weapons permitted by the new protocol are subject to the same substantive obligations. After much discussion, both in the informal on definitions and, more importantly, in small group meetings, it appears that the best compromise on this issue is to include the exclusion for these "Oslo cluster munitions" either in Article 1 on "scope" or in a new article on "exclusions" that would follow article 2 on definitions. The other main definition that was discussed was the definition of "cluster munition victim." The U.S. delegation proposed compromise language that would not include the vague and over-broad formulations in the current draft. A number of countries supportive of the Oslo Convention objected to this approach.

#### International Humanitarian Law

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**¶14.** (U) The P-3 discussions in New York prior to the beginning of the negotiations led to agreement to use a slightly modified version of a draft prepared by the U.S. delegation as the basis for discussions in Geneva. This draft shortened the version of Article 3 in the previous Chairman's draft by eliminating the controversial elements in that text and focusing only on the core principles of IHL particularly relevant to the use of cluster munitions. This version was adopted by the Chairman in the draft he circulated shortly before the start of the negotiations. Article 3 was not discussed extensively during this session of negotiations. The U.S. delegation reiterated our position that an article on IHL would be useful. The French delegation stated explicitly in informal consultations that they did not like Article 3, but could live with it. The ICRC, however, made an intervention opposing any substantive inclusion of IHL principles in the Protocol, arguing that "selective inclusion" of IHL could undermine existing IHL notwithstanding the clear savings clauses for all IHL obligations that are part of the draft article. A number of delegations appear willing simply to follow the ICRC on this issue.

#### Bilateral meetings

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**¶15.** (U) The U.S delegation held bilateral meetings with France, the UK, Canada, Australia, Russia, Japan, China, India, Pakistan, Korea, and Israel. The U.S. delegation also hosted two informal meetings with the P-5, India, Pakistan, Australia, Germany, Israel and Korea to try to work out solutions to the key issues remaining in the Chairman's text. The U.S. delegation also held bilateral meetings with the UK, Germany, and Japan to discuss these countries' implementation of the Oslo Convention, the potential impact on U.S. forces in their countries, and joint operations.

## Way forward

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**¶16.** (U) After the group of 25 blocked further progress on the text, the French delegation produced a new draft that they hoped might be able to attract more support from countries intending to sign the Oslo Convention. The U.S. delegation provided comments to the French on several different versions of the text, as it would be a significant step backwards from the Chairman's draft from a U.S. perspective. Most fundamentally, the French approach would treat cluster munitions excluded from Oslo very differently than the other permitted cluster munitions under the protocol. The U.S. delegation, in the meantime, prepared a new draft text as well as new drafts of several key articles in an effort to bridge some of the remaining differences. However, the delegation did not share these proposals widely as it was clear that a number of countries were not willing to agree to anything during this round of negotiations. Accordingly, it seemed better to hold on to these ideas for a time when there might be more willingness to consider compromise solutions.

## Meeting of High Contracting Parties to Protocol V

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**¶17.** (U) The two-day meeting of High Contracting Parties (HCP) to Protocol V (Explosive Remnants of War) concluded on November 11. The Protocol V States accepted the generic templates suggested by the coordinator on Article 4 for storing, retaining and transmitting information, as a guideline for HCP and the formats for making a request for assistance under the Protocol. The HCP also adopted a non-binding Plan of Action on Victims' Assistance to show the will of HCP to address this issue and provide a guideline for implementing Article 8 paragraph (2) of the Protocol. Although not yet a HCP, all U.S. concerns with this Plan were addressed before it was adopted. Lastly, the HCP agreed to hold an informal experts meeting to continue this year's work on implementing this new Protocol April 24-26.

## Meeting of High Contracting Parties to Protocol II

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**¶18.** (U) The one-day meeting of High Contracting Parties to Amended Protocol II (Mines, Booby Traps, and Other Devices) took place on November 12. These States Parties also agreed to hold an informal experts meeting April 22-23 in order to revitalize implementation of this Protocol, which has been in force for 10 years. This meeting will include looking at how to address IED's within the context of the protocol.

## Meeting of High Contracting Parties to the CCW

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**¶19.** (U) The Meeting of High Contracting Parties to the CCW met for two days. There were two principle decisions coming out of this meeting. First, the High Contracting Parties agreed to extend the mandate for negotiations on the issue of cluster munitions into 2009. The GGE will meet for up to two weeks in 2009, from February 16 to 20 and, if required, from April 14 to 17. The new Chairman of the negotiations will be Gustavo Ainchil of the Disarmament Directory of the Ministry of Foreign Affairs from Argentina. Second, the High Contracting Parties considered a proposal to establish an Implementation Support Unit ("ISU") to facilitate implementation of the Convention and its Protocols. Most delegations spoke favorably about the concept, but a few, including the U.S. delegation, raised questions about the details of the proposal, in particular its cost implications. Although other delegations were ultimately willing to approve the ISU, the U.S. delegation arranged for the decision to be deferred until the next Meeting of High Contracting Parties in order to determine whether funds will be available for this purpose.

## Delegation comment

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**¶20.** (C) Prospects for agreement on a text based on the phasing out of the cluster munitions raising the most significant humanitarian concerns and their replacement by technically more advance weapons appear better in 2009, following the Oslo signing ceremony. While some issues still remain to be resolved concerning such an approach, in principle both the major producers and users and the countries desiring a more complete ban see the value in such a concept. Once it became

clear that negotiations on a Protocol could not be completed this year, US del engaged intensively with interested countries to seek to set the stage for possible agreement in a small number of meetings next year.

¶21. (C) The head of the Canadian delegation, Earl Turcotte, played an unhelpful role in the negotiations, repeatedly insisting that the text include provisions that he knew other delegations could not accept. It is unclear to what extent he was representing the Canadian government's position or whether he was allowing his personal opinions to shape his positions. The U.S. delegation recommends that a demarche to Canada be prepared to raise the issue with the Government of Canada. End comment

Tichenor